

Introduction

In 1993, the religious right, spearheaded by the Jamaat i Islami (JI) and the Islami Oikkyo Jote (IOJ), publicly denounced particular individuals and communities as *murtads* or apostates, and issued calls for their public execution.¹ In several cases, these intimidatory tactics were followed by criminal cases against the individuals concerned, and proscription of their publications for alleged offences against religion. They also accompanied demands for new laws to further restrict the expression of religious difference or dissent. These demands called for the declaration of Ahmadis as non-Muslims, and for the creation of a new offence of 'blasphemy'.

In this paper, I will try to illustrate through discussion of a series of judicial decisions how the religious right in Bangladesh have used this three-pronged strategy – invoking criminal laws to curtail speech by targeted individuals and groups, fomenting a climate of intolerance against them, and mobilising public sentiment for the enactment of draconian new laws – as key tools in their project of silencing expressions of difference, and asserting their vision of a monolithic Islam. While the superior judiciary has provided a measure of relief to those targeted in such attacks, and Parliament has not as yet permitted any major legal changes, such responses are generally defensive, constrained by a political and social climate which increasingly devalues diversity and dissent. In this context, I argue that any serious effort to counter the fundamentalist project of silencing the expression of difference therefore requires, in addition to a defensive legal strategy, a proactive and concerted process of creating, strengthening and reinforcing public opinion in favour of tolerance and pluralism.

Constitutional and legal framework

Bangladesh was founded following a liberation struggle and war of independence fought with the objective of establishing a secular and democratic society which would ensure equality among all its citizens.² Indeed, secularism was originally identified as one of the four pillars of the 1972 Constitution of Bangladesh (along with democracy, socialism and nationalism).

Subsequent periods of autocratic and military rule resulted in total eradication of the first pillar, and significant erosion of the other three.³ In 1977, General Ziaur Rahman, then Chief Martial Law Administrator, promulgated the Fifth Amendment to the Constitution, inserting the phrase *Bismillah-ar Rahman-ar-Rahim* (In the name of Allah, the beneficent, the merciful) before the Preamble, replacing the principle of 'secularism' in the Preamble with the phrase 'absolute faith and trust in Almighty Allah', and amending Article 8 which now provides, as a Fundamental Principle of State Policy, that 'absolute trust and faith in the Almighty Allah shall be the basis of all actions'.⁴ In 1988, under General H.M. Ershad's regime, the Constitution was further amended to insert a new Article 2A in the Preamble purporting to that establish that 'the state religion of the Republic is Islam but other religions may be practised in peace and harmony in the Republic'.⁵

Despite these inroads into its secular character, under Article 41(1)(a) the Constitution continues to guarantee that: "Subject to law, public order and morality, every citizen has the right to profess, practice or propagate any religion."

The Government of Bangladesh is also obligated by international human rights law to protect the rights to freedom of expression and religion. Notably, Article 19 of the Universal Declaration of Human Rights on freedom of expression was used as a model in drafting the corresponding provisions of the Constitution. Bangladesh also has specific obligations to protect the right to freedom of expression and freedom of religion subsequent to its ratification of the International Covenant on Civil and Political Rights in 2000. Importantly, Article 41(1)(a) of the Constitution and the UDHR and ICCPR do not conceive of this right as merely a private matter. For example, Article 19 of the ICCPR includes the freedom to impart information through any media, while Article 18 includes the freedom to manifest religion or belief in public practice and teaching.

In addition, the Constitution secures a range of fundamental rights which reinforce the right to freedom of religion and ensure its full exercise, including absolute guarantees of the rights to equality and equal protection from the law, the rights to life, personal liberty and security (Articles 31 and 32), freedom of association (Art. 38), and freedom of expression, including thought and conscience (Art. 39). Any laws which are not in conformity with fundamental rights are rendered void (Art. 26).

Although the constitutional guarantee of the right to freedom of thought and conscience is absolute, the rights to freedom of expression and the right to freedom of religion are not. Thus, the former is subject to reasonable restrictions relating to 'the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence' (Article 39(2)). Similarly, the right to freedom of religion is 'subject to law, public order and morality' (Article 41). While the restrictions on freedom of religion need not be on specified grounds, they must also be 'reasonable' and non-arbitrary, given that the right to freedom of religion may itself be seen as part of the over-arching right to liberty.⁶

The restrictions specified in Articles 39 and 41 provide a basis for further statutory limitations on speech, including those contained in the Bangladesh Penal Code 1860 (BPC), and related powers to proscribe publications in the Code of Criminal Procedure 1898 (CrPC). I will limit my discussion here to so called 'offences against religion' and 'offences against public tranquillity'. These offences were originally enacted in the colonial period, and were intended to curb and prevent religious or sectarian violence. They include the offences of wantonly giving provocation with intent to cause riot (section 153 BPC); promoting enmity between classes (section 153A BPC); defiling a place of worship (section 295 BPC); acts insulting religion or religious belief (section 295A BPC); disturbing a religious assembly (section 296 BPC); trespassing on burial grounds (section 297 BPC) and utterances wounding religious feelings (section 298 BPC). Punishment for most of these offences was up to two years imprisonment or fine or both. For our purposes, Section 295A of the Penal Code of 1860 is of particular concern, and provides as follows:

Section 295A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.

Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of the citizens of Bangladesh, by words, either spoken or written, or by visible representations insults or attempts to insult the religion or the religious feelings of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.⁷

However, there are certain procedural restrictions on prosecutions under this provision. Only the prescribed authority may lodge a complaint under section 295A BPC,⁸ and prior sanction from the government or from a duly authorised officer of the government is required for a court to take cognizance of an offence.⁹

Under section 99A of the Criminal Procedure Code, 1898, (CrPC), another colonial-era law, the government may also order the forfeiture of any publication or other material which contains such words or representations which constitutes an offence under section 153A or 295A of the Penal Code. To proscribe any publication, the Government must publish a notification in the Official Gazette, and include the grounds for its opinion.

Judicial decisions prior to independence narrowly interpreted section 295A BPC as applying only to insults to religious belief, which in addition to being 'deliberate and malicious' are also 'intended to outrage the religious feelings of the followers of that religion'.¹⁰ The High Court also earlier held that the restriction on the right to freedom of religion (i.e., that exercise of this right must be 'subject to law') does not mean that legislation could wholly negate the right to freedom of religion, but only that laws may be passed which regulate the manner of exercising the right.¹¹ The law may step in to curtail the exercise of this right when the public practice of a religion leads to acts against public order.¹²

In contrast to this position, the trend of judicial decisions post-independence appears to be more mixed, as discussed below. While there have been some positive decisions, with the High Court noting the relevance of fundamental rights to freedom of religion and expression to the course of criminal proceedings under section 295A BPC,¹³ there have also been more troubling developments, in which, for example, the Court has upheld the forfeiture of publications of a particular community, holding that the fundamental right to freedom of religion does not extend to the publication of their literature – which the Court has described as a wrong practised in the name of religion.¹⁴

The religious right's incursions into rights to expression

For the purposes of this paper, I considered four cases involving individual prosecutions under section 295A BPC, of which three concerned reputable writers or journalists, all known for their secular and/or anti-fundamentalist stance. I also considered four cases relating to the forfeiture of publications containing matter deemed hurtful to religious sentiment (under section 99A CrPC). Some are still pending hearing before the courts.¹⁵ To date, only

seven such cases have resulted in reported judgments of the superior courts in the post-independence period, that is 1971-2004. Interestingly, the majority of cases discussed relate to criminal proceedings started during the three-year period between 1992-95.¹⁶

The books proscribed under section 99A CrPC include: two featuring well-known verses from *baul* songs by the Sufi mystic, Lalon Fakir (Dr. (Homeo) Baba Jahangir Beiman al-Shuresari v State,¹⁷ and Sadruddin Ahmad Chishty v Bangladesh and others¹⁸ both relating to the forfeiture of books in 1993), a publication of the Ahmadi community (Anjuman a Ahmadiyya v Bangladesh)¹⁹ regarding *Islam e Nabuat*, then in its tenth edition and in continuous circulation for over forty years, and a popular account by a well-known author, Humayun Azad, regarding women's status and subordination in patriarchal society *Nari*, then in its third edition (Humayun Azad and others v Secretary, Ministry of Home Affairs and others).²⁰

The cases under section 295A BPC include one in which the petitioner was accused in 1989 by a private individual of, amongst other things, having claimed himself to be the Imam Mehedi (Md. Jamir Sheikh v Fakir Md. A. Wahab and another where a Magistrate's Court had issued a warrant of arrest under sections 295A, 298 and 109 BPC).²¹ The other cases involved prominent individuals, including four senior editors of *Jonokontho* (the People's Voice), a leading Bangla-language daily newspaper (Shamsuddin Ahmed and others v The State and another);²² Dr. Ahmad Sharif, who faced two private complaints in 1992 for having committed offences under sections 295A and 298 BPC following a report published in the daily *Inquilab* of alleged remarks criticising Islam made during a private seminar (Dr. Ahmed Sharif v The State and another);²³ and finally Dr. Taslima Nasrin, the award winning feminist columnist, novelist and poet, who was charged with causing hurt religious sentiment by allegedly calling for revision of the Qur'an to ensure women's rights (Nurul Alam, Officer in Charge, Motijheel Police Station v Taslima Nasrin).²⁴

These reported judgments represent only a sample of the criminal prosecutions or proscription orders in such cases. In many, no challenge was made to the orders of forfeiture, for example regarding Nasrin's *Lojja* (Shame) in 1993.²⁵ In others, although private prosecutions were initiated, they were not actively pursued, or did not result in further proceedings before the superior courts.²⁶ In yet others, proceedings are still pending hearing in the superior courts.

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Reviewing the reported judgments, it seems that most prosecutions for offences against religion, or the banning of publications in this context, are intended more to silence, or at least marginalize, dissenting voices, and to reinforce a particular, and intolerant, interpretation of majoritarian views, rather than to protect the religious feelings or beliefs of minorities, or to safeguard communal harmony - the purposes for which the law was enacted. The initiation, conduct and treatment of these cases by the criminal justice system, in particular the lower courts, exhibits certain common features, as highlighted below.

Pattern of cases

All the cases discussed above exemplify certain patterns regarding the nature of the complaints and the responses by the 'accused'.

All the cases were brought **by Muslims against other Muslims**. None of the reported cases concern the use of these particular laws against minorities.²⁸ Those who initiate the cases present themselves as pious Muslims and the defenders of their religion and are quick to undertake **public denunciations and vilification** of the accused as *murtads* or apostates.

In several cases, the allegations made are said to have been **distorted** and **deliberately given greater prominence** by being republished in newspapers controlled or owned by the religious right, thus both igniting and fanning the flames of intolerance. For example, in Taslima Nasrin's case, the statements ascribed to her, though originally published in an Indian newspaper with limited distribution in Bangladesh, were repeatedly republished in national newspapers, including the daily *Inquilab*. Again, in Ahmed Sharif's case, the apex court itself reported a statement by his counsel to the effect that the statements ascribed to him had been distorted and published in *Inquilab*.

The accused invariably **deny any intention to cause hurt** to religious sentiment, and indeed in some cases it appears that they never even made the statements ascribed to them. For example, Taslima Nasrin, Ahmed Sharif and the *Jonokontho* editors all denied having any such intention, while Taslima and Ahmed Sharif both said that they had not made certain statements. In many cases, the legal strategy adopted by the 'accused' has also been to **defuse the allegations** through a combination of disclaimers - first in public, and then reiterated in the pleadings - of the supposedly 'offensive' remarks. A critical task has been to **clarify the actual statement** which forms the basis of the allegations of blasphemy. For example, in Taslima Nasrin's case, she denied the allegations imputed to her on several occasions, first in the press, then, while in hiding, through a letter to the Speaker of the National Parliament, and, finally, in the pleadings before the High Court.

Often, the **alleged statements do not even offend against the relevant legal provisions**. In most cases, the accused appear to have done no more than proffer rational criticisms of obscurantism (*Jononkontho*), call for progressive reform of law (Nasrin), or articulated a non-orthodox version of religious faith or belief (Dr. Homeo Baba; Sadruddin Ahmed Chisty; Anjuman e Ahmadiyya).

In many cases, orders of proscription of books and publications were passed many years after they first came into circulation (and in some cases had been reissued in several editions), indicating changing and hardening attitudes of intolerance towards any form of dissent and diversity.

In each case, the resort to law was reinforced or accompanied by a **public hate campaign**, often **intense and prolonged**, creating the atmosphere of a **modern-day witch-hunt**. The campaigns included hostile coverage in the rightist press, street protests, mass rallies and

wall slogans demanding death by hanging for the *murtads*, and individual death threats, on occasion through *fatwas* issued usually by minor clerics or extremist organisations. Such incitement to violence appeared to be aimed as much at silencing individual victims by terror, as at intimidating the courts into compliance with the 'public' demand for their punishment. Taslima Nasrin faced the most extreme example of this, where the filing of charges was, critically, preceded, accompanied and followed by media reports (in the rightist press, most notoriously *Inqilab* and, earlier, *Millat*), slogans on walls, and public rallies and demonstrations by the religious right, under the banners of Touhidi Jonota Jamat affiliates ('Believing People of Faith'), where slogans denouncing *murtads* (apostates) and repeated incitements to violence were commonplace. She remained in hiding for over two months rather than expose herself to possible attack when approaching the court for redress. In Dr. Ahmed Sharif's case, the papers owned by or leaning towards the religious right focused on dismissing those such as Sharif as 'Hindus' and 'anti-Muslim'. Threats towards him were unchecked by any form of police or state action, and the apex court itself recorded the nature and intensity of the inflammatory situation created to accompany the initiation of a complaint against him.

Even where the cases never continue to trial, the very fact of criminal proceedings having been initiated serves an immediate purpose in that the 'accused' are **discredited and marginalised** by being labelled 'apostates', and thus are significantly disempowered and demoralised. In the first stages of each case, they are compelled to expend substantial resources - material and emotional - in responding to the allegations in the press and in public speeches, and in overcoming the legal hurdles thrown up by the case - appearing in court for hearings, seeking bail, filing petitions to quash the charges, and so on.

The initiation of criminal proceedings has acted as a flashpoint, or, at times, a green light for the outbreak of demonstrations and denunciatory editorialising against their targets. However, once the immediate target of stoking a conflagration was achieved, and in particular once the case was taken up by the superior judiciary, the progress of the cases often appeared **not to be pursued** as vigorously by fundamentalist groups (see for instance the virtual discontinuation of the proceedings against Taslima Nasrin).

While the fundamentalists have been effective in instigating cases - with the collusion, or because of the inaction, of the executive - they have **unable to sustain the momentum** in their campaigns against particular individuals once the latter have sought the protection of the superior courts. Thus, Taslima Nasrin's appearance in court and her being granted bail effectively deflated the fundamentalists' campaign. The expected backlash, gleefully predicted by the fundamentalist media, failed to occur, and within weeks, organisations such as the Jamaat were issuing denials that they had ever called for Nasrin's public execution.

Subordinate courts

In several cases concerning offences against religion, the subordinate judiciary appear to have accepted complaints without any serious scrutiny. It is unclear whether this is due to support for the complainant's perspective, or whether it is symptomatic of the continuing

lack of separation of the judiciary from the executive, and perhaps more disturbingly, of the control or colonisation of state institutions, including those of the criminal justice system, by the religious right.

In all the cases concerned, magistrates took cognizance of complaints made before them, although these did not **meet the basic technical and procedural requirements** (for example regarding the obtaining of prior sanction, or more importantly an assessment of whether the allegations contained in the complaint disclosed even a *prima facie* case). Far from acting as a filter for vexatious or baseless proceedings, the lower courts have almost routinely treated every allegation with sufficient seriousness for warrants of arrest to be issued.

The climate of intimidation generated in many such cases, combined with the continuing lack of separation of the judiciary from the executive, means that the subordinate courts are **slow, and often unlikely, to grant bail**, in the first instance, to those accused in such cases. Consequently, Taslima Nasrin finally appeared before the High Court, rather than the trial court, to seek bail. Dr. Sharif was requested to seek bail before the trial court only after several years had lapsed following the original allegations against him.

Despite the intensity of public denunciations of the individuals targeted, extending to calls for their execution, the subordinate courts **did not order protective measures** to safeguard their personal security.

Superior courts

Given that the lower courts have failed to provide effective redress, and indeed have in some cases themselves acted as vehicles of further oppression and harassment, those accused of offences against religion have been compelled to pursue remedies before the superior courts.

The **approach of the superior courts to the application** of section 295A and **of the procedural requirements** of applying section 99A CrPC has **varied considerably** from case to case. In some instances, they have given considerable latitude to the government regarding its proscription of publications on the basis of their containing matter which is 'hurtful to religious sentiment', and have allowed such restrictions on the operation of the right to freedom of expression. For example, regarding the banning of books containing *baul* verses (Sadruddin Ahmad Chishty case), the apex court held that the notification need not indicate the reasons for the satisfaction of the government,²⁹ and that the government could forfeit any publication purely 'if it appears to the government' that any publication falls within the purview of section 99A CrPC. In contrast, regarding the forfeiture of Humayun Azad's book *Nari*, the Court held that the author and publisher had acquired a fundamental right (freedom of thought and conscience) and this right 'cannot be taken away arbitrarily and whimsically without giving them a chance of being heard'.³⁰

The superior courts have also **varied** in their **approach to freedom of thought and conscience in the context of religious beliefs and views**. In some of the cases under section 99A of the CrPC, the superior courts accepted a monolithic vision of Islam. For example, in the Anjuman a Ahmadiyya case the Court effectively denied that there could be any divergence of views among Muslims, by dismissing summarily the petitioner's submission that since the Ahmadiyyas were also Muslims, it would not be correct to say their book had outraged the feelings of Muslims.³¹ In contrast, in other instances the superior courts categorically upheld freedom of thought, stating, for example, in the Jonokontho case that 'The Constitution of Bangladesh also allows some liberty and freedom to make free and fair criticism of any religion or faith'.³²

In several cases, the Court's intervention resulted in the maintenance of a kind of **political balance or accommodation** between the religious right and the liberal secular forces. For example, the national (and in former case, also significant international) attention generated in Taslima Nasrin's and Ahmed Sharif's cases meant that strong opposition by the government to judicial intervention would have exposed it to considerable embarrassment with the international community. However, withdrawing the charges would lead to further and direct confrontation with the religious right. Thus, the Court's decision to grant bail to the accused authors served to safeguard the individuals from any immediate threats to their security or rights of expression, while the cases remained pending in the system.

New strategies: catch-all laws and blanket bans

While the religious right has used existing offences as a relatively effective tool to harass its political or ideological opponents, the review of the past ten years of court decisions clearly indicates that this strategy has its limitations. Perhaps a realization of this lies behind the renewal and intensification of their current demands to frame new, more far-reaching laws, with catch-all provisions and more severe penalties. The proposals for these laws, for declaring the Ahmadis as non-Muslims on the one hand, and for creating a new offence of 'blasphemy' on the other, are detailed below. These attempts at codifying intolerance have already achieved limited success in the January 2004 government announcement of a blanket ban on Ahmadi publications.

While not perhaps directly connected to these developments, the trend of recent prosecutions for sedition, rather than hurt to religious sentiment, of individuals who have highlighted violence against minorities, and the involvement of the religious right, is also worth noting. These cases may be an inevitable outcome of a deliberate effort to equate the state and the state religion, Islam.³³

Anti-Ahmadi agitations

Since the late 1980s, the religious right, again prominently including the JI and the IOJ, as well as an organisation known as the Khatme-Nabuat, has spearheaded a campaign to enact a law to declare the Ahmadis as non-Muslims, on almost identical lines to the steps already taken in Pakistan to this effect.³⁴

Reportedly, draft legislation for this purpose was framed first in 1988 (the year of the constitutional amendment which made Islam the state religion), again in the late 1990s, and, most recently, in early 2004, but not debated in or tabled before any committee or on the floor of Parliament.

In the absence of legislation, efforts were also made to obtain court orders to this effect. A private lawyer unsuccessfully initiated constitutional litigation in 1993, seeking a declaration from the High Court Division that Ahmadis were non-Muslims. In support of his application he referred to the actions taken against Ahmadis in Pakistan, as well as to the constitutional provisions regarding Islam being the state religion (Article 2A) and the State's endeavour to strengthen fraternal relations among Muslim countries based on Islamic solidarity (Article 25(2)).³⁵ The High Court categorically held that in the absence of any law or Shariat Court in Bangladesh, it was not required to discuss or review the Pakistani decisions. It also stated that Art. 25(2) of the Constitution of Bangladesh 'has not empowered the Government to decide or declare who is Muslim and who is not'. It further stated: '... the Government has no obligation or power to decide or declare any persons or group of persons as non-Muslims in order to safeguard sanctity of [the] State religion'.³⁶

Despite this clear rejection of attempts to legislate against the Ahmadi community, street demonstrations and physical attacks on individual members of the community and on their property and religious institutions continued throughout the 1990s, and became particularly intense in 1993/1994 and again more recently in 2003/2004. Since October 2003, such attacks have included orchestrated mass demonstrations against Ahmadi mosques, threats to individual Ahmadis, and demands that the government declare all Ahmadis as non-Muslims. In certain areas, Ahmadis have faced 'excommunication', 'house arrest' or occupation of their homes. One Ahmadi Imam has been killed, and several other individuals have been beaten and assaulted.³⁷

Most recently, in January 2004, in the face of massive protests led by the IOJ and others, the Government declared a ban on all publications by the Ahmadi Muslim Jamaat Bangladesh, the representative body of the community. The government announced a ban on all publications of the Ahmadiyya community, including the Qur'an and its translations or interpretations. However, no information was sent to the Ahmadiyya community, and no official notification regarding this ban was published. The government press release said the ban had been imposed 'in view of objectionable materials in such publications that hurt or might hurt the sentiments of the majority Muslim population'.³⁸ The legal status of the ban remains unclear at the time of writing.³⁹ The Khatme-Nabuat has vowed to continue its movement until the Government concedes to its demand.

Blasphemy bills

In 1993, Motiur Rahman Nizami MP, the then Secretary General of the Jamaat i Islami, tabled in Parliament a 'blasphemy bill'. Modelled on existing Pakistani laws, this would have resulted in the addition of two new sections, 295B and 295C, to the Penal Code, creating new offences of 'insult to the Koran' and 'insult to the Prophet', respectively carrying maximum

sentences of life imprisonment and death. Sustained criticism of this move from within civil society leaders, reinforced by the then Attorney General's publicly stated opposition to any such measure, stymied this initiative.⁴⁰ As noted by critics of the Bill, echoing analysts of these provisions in the Pakistan Penal Code, the proposed offences would have deviated significantly from the existing laws in at least four ways. First, they made reference to only one religion, Islam, whereas the earlier law applied across communities. Second, they made it an offence to insult religion, rather than to cause insult to the religious feelings of individuals. Third, they provided for significantly increased penalties, the death penalty, in place of a maximum sentence of two years imprisonment. And fourth, the new offences did not require proof of intent.⁴¹

Ten years on, the demands are again being reiterated, though in a somewhat modified form. In 2004, Abdul Mannan MP had prepared a private member's bill on *dhormo obomanona* (insult to religion) but was reportedly persuaded by a fellow MP of the ruling party not to table this in Parliament. According to news reports, this Bill provided that any speech, or gesture, by words or otherwise, or any picture, film or artwork, or behaviour, which insults the state religion, Islam, or Hinduism, Christianity, Buddhism or other religions, or which insults the Qur'an, Sunnah or Islamic Shariat, would be punishable by two years' imprisonment or a fine of one *lakh* (one hundred thousand) taka or both.⁴² The Bill defined 'Shariat' as 'Islamic law and customs', and 'the Sunnah' as the 'Prophet Muhammad (Peace Be Upon Him)'s sayings, actions and precepts/practice'. It is unclear whether this Bill has garnered any official support.

Responses: defending a shrinking space for dissent and difference?

The executive, the law enforcing agencies and the subordinate courts have been relatively slow to act in cases where the religious right have incited violence against writers and others. Thus no charges were laid by the state against those who directly or indirectly issued public incitements to violence and murder, through offering rewards for the execution of certain individuals, or naming others as *murtads*, thus implicitly making them subject to the death penalty. In almost all cases, such calls for the public execution of individual writers were widely reported in the press and repeatedly reconfirmed by those who issued them.

Even where individuals have taken steps to invoke the law against such threats or acts of violence, there has been little effective response from within the criminal justice system, with no investigations having taken place, let alone prosecutions initiated. So for example, investigations into the bomb attacks on the Ahmadi mosques and the killing of an Ahmadi Imam remain pending years and months after the incidents.

Further, where there have been efforts to prosecute those on the religious right for offences relating to speech, they have encountered a qualitatively different response from the courts. In one case, a leader of the Anti-Ahmadi movement, the *Khatib* of the National Mosque, was charged under section 501 BPC following his describing those who had supported the struggle for national liberation of Bangladesh as *gaddars* (traitors), and compelled to appear before the Magistrate; he was ultimately acquitted.⁴³

This case was something of an exception. In most cases, the writers, poets and journalists who have been targets either of the fundamentalists, as the subject of a *fatwa*, or of the state, in a section 295A case, have rarely initiated or pursued counter proceedings. Although Taslima Nasrin made a complaint against a fundamentalist organisation which had issued a *fatwa* offering a cash reward for her execution, and the accused individuals gave a public statement denying that they had issued such a *fatwa*, she ultimately dropped the case. A relative made a separate complaint regarding another *fatwa* threatening her life.⁴⁴ Critically, it was left to the accused's family to initiate a private complaint, in the face of state inaction. Again, the case was not pursued to its conclusion, a combined result of the complainant's extreme vulnerability to further reprisals and the reality of the court's delay and continued inaction.⁴⁵

Finally, even where an individual or group is willing to pursue a legal action to its conclusion, it may not be able to secure a remedy from the courts. The legal response to the cases has overwhelmingly favoured the option of immediately defusing the controversy or the furore rather than resolving the contradiction which underlies each case: the right to free expression *vis-a-vis* the right to religious freedom. Indeed, while the court's intervention has been critical in enabling the immediate protection of the 'blasphemer' from the fundamentalists, its role in protecting speech has been less clear-cut.

Conclusion

The discussion above focuses on cases from the early and mid 1990s that relate to prosecutions of individuals for 'causing hurt to religious sentiment' or proscription of their books or articles on similar grounds. As noted, many of them were instigated by the religious right and were accompanied by public mobilization by the right and vilification of and threats to individual writers and artists. Despite the generation of such tensions, the courts were able to intervene effectively to defuse the situation and to safeguard individual liberties. However, with the exception of one or two cases (see Humayun Ahmad's case and Shamsuddin Ahmad's case, *supra*), it would be difficult to assert that the courts' intervention resulted in positive developments in the law.

While the impact of post-independence incursions into constitutional guarantees of secularism has not been critically assessed to date, it seems evident that if nothing else, it enables, in particular rightist and obscurantist forces to articulate their demands within a constitutional framework. The amended Constitution's reference to the primacy of Islam as the state religion is treated as a mandate by the religious right to argue in favour of the marginalization of other religions and religious practices, and indeed their eradication from national life.

In contrast to the failure of those committed to the principles of secularism and the freedom of religion to track systematically the impact of the constitutional changes in this area, the religious right have methodically invoked the amended provisions to buttress their arguments for restricting the rights of those of 'other religions'. As part of their strategy, and through their

instigation of criminal prosecutions and demands for changes in the law, they appear to have arrogated to themselves the authority also to define the content of Islam as a religion, and to constrain its diversities of faith and practice.

As the above discussion of reported judgments indicates, while the state is responsible for the conduct of prosecutions or for the proscription of publications in cases relating to 'causing hurt to religious sentiment', it is the religious right that mounts the necessary pressure for invoking the law in such cases. Even where trials are not held, or bans not fully enforced, the threat of legal action - accompanied by the religious right's public threats of violence and echoed through their media - serves not only to intimidate the individuals concerned, but also to inhibit broader democratic dissent by inculcating an atmosphere of fear and intolerance.

In most cases, there appears to be (with very few exceptions) little principled opposition by state agencies or the courts to the adoption of such intimidatory tactics by the religious right. However, in times of particular tension, or in respect of cases which generate particular public concern, the superior courts do appear to have played a key moderating role, to mitigate the impact of a compact between the religious right and sections of the executive. Their intervention has enabled protection of the life and liberty of individuals who have been threatened, sometimes for words put into their mouths, sometimes for what they represented: their capacity to criticise and question, or to present an alternative to the voices of orthodoxy. It is very rarely that the courts have gone further, beyond accommodation, to denounce those responsible for using and abusing the law for their own political ends. In other words, they have largely undertaken a necessary, but limited, problem-management approach, resolving immediate tensions rather than addressing the underlying points of tension between the religious right and those seeking to secure liberal secularism.

This dual approach of the superior courts - giving considerable latitude to the executive's proscription of publications and allowing such restrictions on free expression while safeguarding individual liberty - points to a combination of the courts' lack of distance from the executive, along with the strength of progressive civil society, and especially international solidarity. The combination meant that while in many cases, while the courts have not gone so far as to quash the cases, they have granted bail to the persons involved, thus finding a means for immediate defusion of the situation. The executive has pursued a similarly dual approach: in general it has not withdrawn proceedings, (perhaps for fear of a political backlash from the right) once they have been initiated in such cases, but it has also not opposed bail particularly vehemently (perhaps in consideration of the international response).

Recent developments point to shifting patterns in the initiatives adopted by the religious right. The set of judgments under section 295A BPC and section 99A CrPC could be seen as ultimately constituting a set-back for the religious right's project of resorting to the existing law. Hence the religious right's current project of pressing for more wide-ranging and draconian laws regarding 'blasphemy' and having Ahmediyyas declared non-Muslims, demands intended to restrict the fundamental freedoms of speech, expression and thought. Similarly, in order to preclude the scope for judicial intervention that existed in respect of

individual prosecutions and the banning of publications, the religious right has opted for a strategy of changing the law itself, to remove all scope for exercise of judicial discretion in favour of safeguarding the rights of those who dissent from or critique religious orthodoxy. In addition, they have engaged in threats or acts of violence, in particular against those representing secular cultural values. So the past few years have seen bombings of places and events which provide an alternative cultural space, such as cinema halls, a circus and even the *Pohela Boishakh* (Bengali New Year) celebrations, as well as bombings of religious institutions, such as several Ahmadiyya mosques, individual attacks on well-known writers, such as the poet Shamsur Rahman and, now most recently and most brutally, the murder attempt on the novelist Humayun Azad.⁴⁶ While these incidents all remain under investigation, years after the event, it is notable that many of the victims remain convinced of the involvement of the religious right.

Responses from within progressive civil society also merit some attention. In most cases, those who speak out in defence of the accused - whether in the courts, in the media or in public meetings and campaigns - generally focus on denying the allegations against them, rather than asserting their right to freedom of expression. Despite the independence struggle's objective of establishing a secular and democratic society, public discourse in Bangladesh now largely limits the discussion of religion within certain parameters, and there is little receptivity to views or statements which deny or even question the terms of religious beliefs or assertions. Thus representing or repackaging statements as part of an engagement with and about religion is seen as more politically effective and indeed palatable. This situation is likely to be reinforced with the increasing threats to those individuals known for their capacity for vocal, reasoned and persuasive dissent and critique of the religious right.

This review of the past decade's case law demonstrates that the superior judiciary has played a key role in safeguarding space for dissent against the forces of the religious right, and, as this paper argues, reported judgments indicate that to date the Bangladesh superior judiciary has to some extent fulfilled that role. Is it possible to expect a stronger stance from the courts in the current constitutional and political context? Can the courts be the ultimate guardians of liberal secular values, where these are not sufficiently safeguarded by the overarching political and cultural context? This is difficult to conjecture, but securing the genuine and effective independence of the judiciary from the executive, of particular significance for the lower judiciary, on the one hand, and continuing activism and engagement which challenges attempts to clamp down on diversity and dissent, may be key to furthering the scope for free expression of liberal and secular voices in Bangladesh.

Endnotes

¹ The Jamaat i Islami, Bangladesh (JI), and the Islami Oikkyo Jote (IOJ), an alliance of seven parties, both call for the imposition of 'Islamic law'. Following the October 2001 general elections, the JI (17 seats) and the IOJ (2 seats) formed part of a coalition government led by the Bangladesh Nationalist Party (191 seats), headed by Prime Minister Begum Khaleda Zia. The JI holds two cabinet posts.

² On secularism in Bangladesh, see Asim Roy (1983), *The Islamic Syncretistic Tradition in Bengal*, Princeton University Press; Tazeen M. Murshid (1996), *The Sacred and the Secular: Bengal Muslim Discourses, 1871-1977*, OUP; and Rafiuddin Ahmed (1982), *Bengal Muslims, 1871-1906: A Quest for Identity*, OUP India.

- ³ A significant related amendment, made during General Ziaur Rahman's regime, was the repeal of the constitutional bar on religion-based political parties (Second Proclamation Order No. III of 1976, omitting proviso to Art. 38).
- ⁴ While the Fundamental Principles of state policy are not judicially enforceable, laws must be interpreted harmoniously with them: *Kudrat-e-Elahi v Bangladesh* 44 DLR (AD) 319.
- ⁵ Article 2A, as inserted by Act XXX of 1988. This phrase echoed the language of the Objectives Resolution adopted by the Constituent Assembly of Pakistan in 1949, which stated that 'adequate provisions shall be made for the minorities to freely profess and practice their religions'. Indeed, the Constitutions of Pakistan, of 1956, 1962 and 1973, all guaranteed freedom of religion, as does the current Constitution of Bangladesh. However, it should be noted that, unlike Pakistan, Bangladesh remains the 'People's Republic of Bangladesh' and has not been constitutionally defined as an Islamic state. Further, constitutional challenges to the 8th amendment regarding the insertion of Art. 2A remain pending before the Supreme Court.
- ⁶ See Mahmudul Islam (2003) *Constitutional Law of Bangladesh* (2nd Edn), Dhaka: Mullick Brothers, p. 263 .
- ⁷ Section 295A was inserted in the Penal Code by Criminal Law Amendment Act (XXV of 1927) section 2, after the agitation following the decision of the Lahore High Court in the notorious Rangeela Rasul case, in which it was held that polemics, no matter how scurrilous, against a dead religious leader, did not amount to an offence under section 153A.
- ⁸ See *Md. Jamir Sheikh v Fakir Md. A Wahab and another* 1990 BLD 452, discussed below.
- ⁹ Section 196, Code of Criminal Procedure 1898 (CrPC).
- ¹⁰ *WMN Trust Lahore v Crown* 7 DLR (WPC) 17, upheld in *Shamsuddin Ahmed v Bangladesh* 20 BLD (HCD) 2000 268 per Abu Sayeed J. See Ratna Kapur, 'Who Draws the Line? Feminist Reflections on Speech and Censorship', *Economic and Political Weekly*, for a discussion of Indian case law and recent developments.
- ¹¹ *Jibendra Kishore v East Pakistan* 9 DLR (SC) 21.
- ¹² *Ibid*, at para 39.
- ¹³ *Shamsuddin Ahmed v Bangladesh* 20 BLD (HCD) 2000 268 per Abu Sayeed J, at para 7.
- ¹⁴ *Bangladesh Anjuman-E-Ahmadiyya v Bangladesh* 45 DLR 185 per Sultan Hossain Khan J.
- ¹⁵ The superior courts refer to the High Court Division and Appellate Division respectively, which together comprise the Supreme Court of Bangladesh.
- ¹⁶ These prosecutions were all begun under the Bangladesh Nationalist Party (BNP) led government, elected to power in 1991. In October 2001, the BNP was again re-elected to office.
- ¹⁷ 16 BLD (1996) 141.
- ¹⁸ 16 BLD (1996) 141 upheld in part by 18 BLD (AD) (1998) 210.
- ¹⁹ 45 DLR (1993) 185.
- ²⁰ Writ Petition No. 2553 of 1995.
- ²¹ (1990) 10 BLD 452.
- ²² 20 BLD (2000) 268; 52 DLR 497).
- ²³ (17 BLD (1997) 235) and *Moulana Md. Yusuf v State and another* (3 BCLC (AD) 171).
- ²⁴ Complaint Case No. 1315 of 1994, unreported.
- ²⁵ A fictionalised account of the orchestrated attacks on Hindus in Bangladesh following the demolition by the Hindu right of the Babri Masjid in Ayodhya, India.
- ²⁶ See for example the case initiated by Mohd Rafiqul Islam Rony MP against Prof. Ali Asghar for causing hurt to religious sentiment, regarding his alleged remarks that religious instruction need not be compulsory.
- ²⁷ Currently pending cases include *Mesbahuddin Ahmed v Bangladesh* and others Writ Petition No. 681 of 2003, by the publisher/distributor of Taslima Nasrin's *Uttol Hawa* (Wild Wind), the second volume of her autobiography. In 2002, the Government confiscated the Indian edition and prohibited its sale in Bangladesh under section 99A CrPC, later including those published from Dhaka. Criticisms of the banning order in the press included A.H Jaffor Ullah, 'Banning Books in Bangladesh', *The Bangladesh Observer*, 7 September 2002;. The Writ Petition notes that the government order gives no reasons for the banning (merely stating that the book is likely to cause social and political disharmony, contains statements against Islam and would cause serious enmity and hatred within society, the state and among religious communities) and further that it was never communicated to the publisher or author. The petition challenges both the banning order, and section 99A CrPC itself as violating the right to freedom of religion under Art. 41 of the Constitution.
- ²⁸ In late 2002, members of an amateur theatre group in Faridpur, a number of whom were prominent in the local Hindu community, were arrested for having committed the offence of 'causing hurt to religious sentiment' under section 295A BPC, regarding their dramatization of a play.

- ²⁹The reasons stated for the forfeiture were as follows: 'For publication of statements hurtful to the fundamental beliefs, that is the religious sentiments of followers of Islam', 18 BLD (1998) (AD) 210 at para 3.
- ³⁰Unreported judgement
- ³¹See the Anjuman e Ahmadiyya Case, *supra*, per Sultan Hossain Khan J.: 'The petitioner's [submission that] Ahmadiyyas also being Muslim, the order stating that the book has not outraged the feelings of the Muslims' is not correct. The decision in the Anjuman case was upheld by the High Court in Sadruddin Ahmed Chishty v Bangladesh (44 DLR (1996) 39). Interestingly the Anjuman e Ahmadiyya decision was not reported in the DLR until 1993, although the judgment itself was delivered some 7 years earlier in 1986.
- ³²Para 9, per Abu Sayeed J.
- ³³See for example the sedition cases brought against the journalists/researchers Shahriar Kabir, Saleem Samad and Priscilla Raj in 2001/2002.
- ³⁴In Pakistan, President Bhutto's government passed a constitutional amendment in 1974 declaring Ahmadis to be a non-Muslim minority, and General Ziaul Haq then passed an ordinance in 1984 (inserting a new section 298B and 298C to the Pakistan Penal Code) criminalising any actions by Ahmadis calling themselves Muslims, using names and titles associated with Islam, using Muslim places of worship or propagating their faith.
- ³⁵Alhaj ABM Nurul Islam v Government of Bangladesh, Writ Petition No. 298 of 1993 (judgment dated 15 April 1993, per Md. Abdul Jaill and Mohammad Fazlul Karim JJ)(unreported, on file with author).
- ³⁶*Ibid*, p. 10.
- ³⁷Amnesty International, Bangladesh (2004) *The Ahmadiyya Community – their rights must be protected*, 23 March.
- ³⁸*Daily Star*, 9 January 2004.
- ³⁹Four civil society organisations, Ain-o-Salish Kendra, the Shonmilito Shamajik Andolon (United Social Movement), Mohila Porishod (the largest national women's organisation) and Naripokkho (For Women), have issued a legal notice on the government threatening a constitutional challenge to the ban on Ahmadiyya publications.
- ⁴⁰See ASK (1994) *Attack on Fundamentals*, Dhaka: ASK Publications, for a compilation of articles and the text of the Blasphemy Bill 1993.
- ⁴¹See Sara Hossain, 'The Jamaat's Proposed Blasphemy Law: Destroying Secular and Democratic Space' in ASK, *Attack on Fundamentals*, *supra*, and Amnesty International (1994) *Pakistan: Use and Abuse of the Blasphemy Laws*, July, AI Index: ASA 33/08/94.
- ⁴²The *Daily Manob Jomin*.
- ⁴³An appeal against acquittal was filed before the High Court (ASK (1997) *Human Rights in Bangladesh*).
- ⁴⁴Mufti Syed Nazrul Islam had reportedly publicly offered a reward of taka 100,000 to anyone who killed Nasrin. Following a complaint by Nasrin's brother before the Magistrate's Court in Khulna for incitement of violence (section 506, Penal Code), the Court ordered a police inquiry. It is not known what further action resulted.
- ⁴⁵The perceived threat was so high that when Taslima's brother attended court to make the complaint, members of the Shonmilito Sangskritik Jote (United Cultural Alliance, a major network of cultural activists and organisations) stood guard to deflect any attack.
- ⁴⁶Azad tragically died while on an International PEN fellowship in Germany in 2004, which he took up only after his son was attacked and his family threatened, following his recovery from near-death after being savagely attacked as he emerged from the annual Ekushey Boi Mela (book fair).